No. 75-212

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS W. DONOVAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 513 F.2d 337. The opinion of the district court (App. D, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on March 17, 1975. A petition

for rehearing with suggestion for rehearing *en banc* was denied (App. C, *infra*) on June 12, 1975. On July 2, 1975, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to and including August 11, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2518(1)(b)(iv) requires the identification in a telephone interception application of every person, anywhere in the world, whom the government has probable cause to believe it will overhear participating in conversations relating to the specified illegal activity.

2. Whether the government has the duty under 18 U.S.C. 2518(8)(d) to advise the court of the identity of every person whose conversations have been overheard in the course of a wire interception so that the Court may exercise its discretionary authority to serve them with a notice of interception.

3. Whether, if the government violated the wire interception statute in this case, suppression of the evidence derived from the intercept is justified.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set out in Appendix E, *infra*.

STATEMENT

1. On November 28, 1972, Chief Judge Battisti of the United States District Court for the Northern District of Ohio issued an order pursuant to Title III

of the Omnibus Crime Control and Safe Streets Act of 1968 authorizing the interception of communications of "Albert Kotoch, Joseph Anthony Spaganlo, Ernest L. Chickeno, Raymond Paul Vara, George M. Florea, Suzanne Veres and others, as yet unknown" over two telephones used by Kotoch and Spaganlo and two telephones used by Florea in conducting an illegal gambling business. The authorization was effective for a period of 15 days (C.A. App. 66-69). On December 26, 1972, Judge Contie (of the same court) extended the November 28 order for an additional 15 days with respect to two of the four telephones originally authorized (C.A. App. 103-106); at the same time, he also issued an order authorizing interception for 15 days over an additional telephone at the same location, the existence of which had not been known at the time of the original application (C.A. App. 107-110).[1] The December 26 orders authorized the interception of communications of "Albert Kotoch, Joseph Anthony Spaganlo, Chuck [last name unknown], [first name unknown] Slyman, George M. Florea, and others, as yet unknown" over the three telephones used in conducting the illegal gambling business (C.A. App. 104, 108).

On February 21, 1973, Judge Battisti ordered that notice be served upon 37 persons who had been overheard during both periods of interception (C.A. App.

[1] The December 26 orders, although issued separately by the court, were essentially a single extension of the original order; for purposes of clarity, they will be treated as such in this petition, as will the applications for the December 26 orders.

118-120). On September 11, 1973, upon motion of the government, the court ordered that notice be served upon two additional persons (C.A. App. 134-135). The government inadvertently failed to give the court the names of Merlo and Lauer, and they were not served with notices.

2. Respondents Thomas W. Donovan, Dominic Ralph Buzzacco, Vanis Ray Robbins, Joseph Francis Merlo, and Jacob Joseph Lauer, together with twelve others, were subsequently indicted for conspiracy to conduct and for conducting an illegal gambling business, in violation of 18 U.S.C. 371 and 1955 (C.A. App. 9-12).[2] The defendants filed several pre-trial motions seeking to suppress evidence derived from the wire interceptions. After an evidentiary hearing, Judge Krupansky, relying on the circuit court opinion in *United States* v. *Kahn*, 471 F.2d 191 (C.A. 7), reversed, 415 U.S. 143, suppressed as to respondents Donovan, Buzzacco and Robbins evidence derived from the December 26 interception, on the ground that the failure to identify them by name in the applications and orders of that date violated 18 U.S.C. 2518(1)

[2] Those indicted along with respondents included three persons who had been named in the original and extension applications and orders (Kotoch, Spaganlo and Chickeno) and two whose identities had only been known in part at the time of the extension application (Harvey "Chuck" Trifler and Joseph Slyman). After granting the motions at issue here, the district court severed the remaining defendants for trial: Kotoch pleaded guilty to the substantive count, Spaganlo and Trifler were convicted by the jury of conspiracy, the court dismissed the indictment as to Michael Malvasi, and the others were acquitted.

(b)(iv) and 2518(4)(a). The district court also ruled that, although Merlo and Lauer were not known until after the December 26 application, evidence derived from both periods of interception was required to be suppressed as to them because they had not been served with notice of the interception (App. D, *infra*, p. 54a).

3. The court of appeals affirmed. The panel was unanimous on the identification question (relating to Donovan, Buzzacco and Robbins) but was divided on the notice question (relating to Merlo and Lauer). On the identification question, the court relied on dictum in *United States* v. *Kahn*, 415 U.S. 143, 152, 155, and held that intercept applications and orders must identify all persons whose conversations relating to the criminal activity the government has probable cause to believe it will intercept. After agreeing with the district court's finding that the government had such probable cause as to Donovan, Buzzacco and Robbins at the time of the December 26 application,[3] the court affirmed the suppression of evidence derived from the interception order of that date (App. A, *infra*, pp. 7a-13a).

On the notice question, the majority held that the government had an implied statutory duty to inform

[3] In the court of appeals, the United States conceded that Donovan and Robbins had been "known" within the meaning of the statute at the time of the extension application. However, the government contested as clearly erroneous the district court's finding that the government was aware of the likelihood that Buzzacco would be overheard in conversations relating to illegal gambling activity.

the issuing judge of the identities of all persons who had been overheard, so that he could determine whether discretionary notice should be served upon them. Because the government had, albeit inadvertently, failed to perform this implied duty as to Merlo and Lauer, the court affirmed the district court's suppression of evidence against them derived from both periods of interception (App. A, *infra*, pp. 13a-17a). The dissenting judge agreed with the majority's suppression of the evidence against Donovan, Robbins and Buzzacco. He further agreed that there was an implied statutory duty for the government to inform the issuing judge of the identities of all persons who had been overheard. However, he would have held that suppression should not be required in the absence of bad faith or prejudice, neither of which appeared to be present in this case. Accordingly, he would have vacated the suppression order as to Merlo and Lauer and remanded to the district court for further consideration (App. A, *infra*, p. 26a).

REASONS FOR GRANTING THE WRIT

This case involves several important issues affecting the administration of the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, regulating the interception of communications in the course of investigations of certain serious crimes. The decision of the court of appeals regarding the obligations imposed upon the government by Section 2518 to identify various individuals in applications for intercept authority speaks to a question

about which there is a substantial practical need for authoritative guidance from this Court; moreover, it resolves the questions in a manner that creates grave (and, we submit, wholly unwarranted) practical problems in the administration of the Act.

In addition, the court of appeals' sweeping use of the suppression remedy, conflicting with the decisions of other circuits, implicates important issues left unresolved by this Court's decisions in *United States* v. *Giordano*, 416 U.S. 505, and *United States* v. *Chavez*, 416 U.S. 562. By suppressing the evidence against these respondents, the court of appeals has instituted a major departure from the criteria for use of the suppression remedy announced by this Court in *Giordano* and *Chavez* and has, we submit, exceeded the limits of the power to exclude evidence conferred by Congress in Section 2518(10). The remedial questions presented by this case also call for authoritative resolution by this Court.

1. The court first held that wire interception applications and orders must identify all persons who the government has probable cause to believe will participate in conversations on the target telephone lines relating to the activity being investigated. It further held that even a good faith, non-prejudicial breach of this duty to identify requires the suppression of the conversations as evidence against the unidentified individuals. This aspect of the case affects respondents Donovan, Robbins, and Buzzacco. The correctness of this holding is also the subject of the

government's pending petition for a writ of certiorari in *United States* v. *Bernstein*, No. 74-1486.

We submit that both the decision in the instant case and that of the Fourth Circuit in *Bernstein* were in error.[4] Our arguments in support of this contention are summarized in our *Bernstein* petition, a copy of which we are serving on respondents, and will not be repeated at length here. We add only that the related portions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 demonstrate the correctness of our contention that Section 2518 (1) (b) (iv) requires only that the target of the interception be identified.[5]

a. Section 2518(1)(b) requires that the applicant set forth a full and complete statement of facts and circumstances relied upon to justify his belief that an order should be issued, including, *inter alia*, a description of the nature and location of the facilities from which the communications are to be

[4] As noted in the *Bernstein* petition (pp. 7-8, n. 5), a panel of the Fifth Circuit has ruled in favor of the government on similar facts. *United States* v. *Doolittle*, 507 F. 2d 1368 (petition for rehearing *en banc* granted April 7, 1975, argued June 3, 1975). A panel of the District of Columbia Circuit has followed the holding of *Bernstein*. See *United States* v. *Moore*, 513 F. 2d 485, 492-494 (petition for rehearing *en banc* pending).

[5] As in *Bernstein*, the targets of the interception in this case were named in the appropriate applications and orders: Kotoch and Spagnolo in those relating to both interceptions and Florea in those relating to the first intercept. Moreover, as in *Bernstein*, the conversations suppressed were with the named targets.

intercepted and the identity of the person, if known, whose communications are to be intercepted. The linking together of the person who is to be identified with the facilities from which communications are to be intercepted leaves little doubt that "the person" referred to in the statute is the individual who owns or regularly uses the facilities—*i.e.*, the target of the interception.[6] This conclusion is further confirmed by the fact that the New York statute from which Title III was in part derived required the identification of "the person *or persons* whose communications * * * are to be overheard * * *" (*Berger* v. *New York*, 388 U.S. 41, 59; emphasis supplied), but Congress abandoned that formulation in favor of the use of the singular.

This reading of the statute is reinforced when Section 2518(1)(b) is considered together with the subsections governing the issuance of the order. Thus, Section 2518(3) requires the issuing judge to determine, *inter alia*, that there is probable cause to believe that "an individual" is committing an offense (2518(3)(a)), that communications concerning the offense will probably be obtained through the interceptions (2518(3)(b)), and that there is probable cause for belief that the facilities or place to be monitored are being used in connection with the commission of the offense or are leased to, listed to, or

[6] When Congress intended to refer to all parties to the conversation, rather than simply the subject or target of the interception, it knew how to do so clearly. See, *e.g.*, 18 U.S.C. 2518 (8) (d), 2510(11); cf. 2511(2) (c).

commonly used by "such person" (2518(3)(d)). The purpose of this subsection is to "link up specific person, specific offense, and specific place [or facility]." S. Rep. No. 1097, 90th Cong., 2d Sess., p. 102 (1968).

Furthermore, the last paragraph of Section 2518 (4) authorizes the government to obtain a provision in the intercept authorization directing "that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that * * * [are being accorded] *the person whose communications are to be intercepted*" (emphasis supplied). The italicized phrase echoes the wording of the naming requirement in Section 2518 (1)(b)(iv) in a manner that makes it unmistakeably clear that Congress was referring in both places to the target of the interception (since the communication common carrier clearly would not be providing any services, to persons calling in from unmonitored phones, that would be subject to interference).[7]

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[7] With respect to the issue of the propriety of suppression as a remedy for a violation of the naming requirement, we also rely principally on the arguments set forth in our *Bernstein* petition. We note in addition that this Court suggested in *Chavez* that the legislative history should be considered in determining whether a particular provision of Title III was sufficiently central to the congressional scheme that its violation should lead to suppression (416 U.S. at 578, 579). As

b. The facts upon which the courts below relied to demonstrate that there was sufficient probable cause to require the identification of respondent Buzzacco, no less than those involved in *Bernstein*, demonstrate the difficulties inherent in applying the probable cause standard in wire interception cases.

The government knew that Buzzacco had at one time been a bookmaker and that two of the suspects named in the November 28 order had placed numerous calls to a telephone Buzzacco was using in Youngstown, Ohio, under the name of Tony Chesino (C.A. App. 56); the nature of the calls was not known. These facts were set out in the affidavit accompanying the application of November 28 (C.A. App. 55-58).[8] Buzzacco was not named in the application, although the agent who made it suspected that Buzzacco was involved in bookmaking with the named suspects. During the first interception, a person in Niles, Ohio, using a telephone listed to T. K. Peters and nicknamed "Buzz" or "Buzzer" was overheard discussing gambling business with several named targets.[9]

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with the provision at issue in *Chavez*, "no real debate surrounded [the] adoption" of the naming requirement (*id.* at 579), and there is only passing reference (based on erroneous legal premises) in the committee report to the purpose for inclusion of the provision in the legislation. See S. Rep. No. 1097, *supra*, at pp. 101, 102.

[8] This affidavit was incorporated into and a copy attached to the affidavit supporting the December 26 application (C.A. App. 93, 102).

[9] At some time not shown on the record but perhaps as late as December 29, 1972—after the filing of the applications

Based on this meager amount of information, the court below charged the government with knowledge that Buzzacco had moved his gambling operation from Youngstown to Niles, held that he therefore should have been identified in the December 26 application, and ruled that the failure to do so required suppression of his conversations. This set of facts, like those in *Bernstein*, illustrates the grave practical drawbacks that accompany the expansive construction given the naming requirement by the Fourth and Sixth Circuits.

2. The court below further held, this time with one judge dissenting on the suppression issue, that the government must inform the issuing judge of the identities of all persons who have been overheard, so that he may decide which of them, if any, should receive discretionary notice of the interception. Failure so to inform the judge will, the court held, result in suppression of evidence as to any person not served with notice, even though the error may have been made in good faith, and despite the absence of prejudice.[10] This issue relates to respondents Merlo and

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which the court below stated should have contained Buzzacco's identity—the government agents determined that the person at the Niles, Ohio, telephone was Buzzacco and that "T. K. Peters" was probably another alias used by Buzzacco.

[10] It is the current practice of the Department of Justice to provide the supervising judge with the name of every person who has been overheard if there is judged to be any reasonable possibility that the person will be indicted. Additional names are, of course, provided if requested by the supervising judge. That policy was meant to be followed in this case, and 39 names were in fact supplied. There was no reason other than administrative error for the failure to provide the names of respondents Merlo and Lauer. See note 14, *infra*.

Lauer. The decision conflicts with decisions of the United States Courts of Appeals for the Third, Eighth, and Ninth Circuits.[11]

This conflict in interpretation concerning a significant aspect of a federal statute itself warrants review by this Court. Moreover, the result below requires the suppression of relevant, reliable evidence, although such a remedy is neither authorized by the statute nor justified by considerations of public policy.

a. The oversight in failing to inform the judge that Merlo and Lauer were overheard violated neither

[11] *United States* v. *Iannelli*, 477 F.2d 999, 1003 (C.A. 3), affirmed on other grounds, 420 U.S. 770, and *United States* v. *Wolk*, 466 F.2d 1143, 1145-1146 (C.A. 8), hold that a good faith error in failing to provide notice of an interception is not grounds for suppression where no prejudice results. Cf. *United States* v. *Smith*, 463 F.2d 710, 711 (C.A. 10) (suppression inappropriate for non-prejudicial good faith delay in service of notice). *United States* v. *Chun*, 503 F.2d 533, 540 (C.A. 9), upon remand, 386 F. Supp. 91 (D. Hawaii), held alternatively that "[t]o discharge [the government's] obligation the judicial officer must have, at a minimum, knowledge of the particular categories into which fall all the individuals whose conversations have been intercepted. Thus, while precise identification of each party to an intercepted communication is not required, a description of the general class, or classes, which they comprise is essential to enable the judge to determine whether additional information is necessary for a proper evaluation of the interests of the various parties." Here, in contrast, the court interpreted the Act as requiring just such precise identification.

the letter nor the spirit of the Act. Section 2518(8)(d) provides that notice shall be served upon persons named in the order or application and that the court may in its discretion order such service upon other parties to intercepted communications.[12] Merlo and Lauer were not named in the applications or orders pursuant to which the interception was conducted, and the district court found that this omission was proper. Therefore, they were not entitled as a matter of right to receive notice. Nor, since the judge did not order discretionary notice served upon them, did their lack of notice violate the explicit provisions of Section 2518(8)(d).

Neither was the spirit of the Act violated. The purpose of the post-use notice provision is to prevent the secret use of electronic surveillance. The provision was intended to ensure that the subject of the surveillance will eventually learn that electronic surveillance was used against him. The government's activity thereby becomes known, and the person notified may proceed with a civil action under 18 U.S.C. 2520 if he believes his rights have been violated. See S.

[12] The following information must be contained in the notice: the date the order was entered or the application denied, the period of interception authorized, and the fact that communications were or were not intercepted. Notice must be served within a reasonable time, not to exceed 90 days, after the termination of the interception or denial of the application; persons receiving notice may request the issuing judge in his discretion to allow them to inspect the intercept papers or the intercepted communications. However, on motion of the government and for good cause shown, the issuing judge may postpone service of notice beyond 90 days.

Rep. No. 1097, *supra*, at p. 105.[13] In the instant case, this purpose was amply satisfied. This was no secret wiretap—39 persons received notice of the interception.[14]

Furthermore, in the words of the dissenting judge, "it challenges credulity to conclude * * * that [Merlo and Lauer] did not have some actual notice of the interceptions" (App. A, *infra*, p. 25a). They obviously received sufficient notice to permit them to file and argue their motions to suppress; they have, in short, suffered no prejudice from lack of formal notice. Cf. *United States* v. *Cirillo*, 499 F.2d 872, 882-883 (C.A. 2), certiorari denied, 419 U.S. 1056.[15]

[13] Although, in the interest of justice, the issuing judge may order notice served upon other parties to intercepted conversations, the post-use notice provision was not intended to provide a defendant information needed for the preparation of his defense: that information is provided by the 10-day notice provision of Section 2518(9). S. Rep. No. 1097, *supra*, at pp. 105-106. The minimal amount of information provided by inventory notice clearly supports this view of the statute; bare notice of when the interception took place is of little value in preparing a defense. Under the 10-day notice provision, however, the defendant receives a copy of the order and the application. Of course, defendants normally have access to copies of the intercepted communications, as well as the intercept papers, well before the 10-day notice would be required.

[14] Apparently, the names of Merlo and Lauer were not transmitted to the judge because of a failure of communication between the FBI and the prosecutor (App. A, *infra*, p. 15a).

[15] The intercept papers remained sealed until November 26, 1973, when they were unsealed by Judge Krupansky (C.A. App. 2). Prior to that date, none of the defendants had access to the papers or the tapes of the intercepted communications; Merlo and Lauer filed their motions to suppress about two weeks after the unsealing (C.A. App. 136, 137).

b. Even assuming that the failure to advise the court that Merlo and Lauer had been overheard violated a duty imposed on the government by implication in Section 2518(8)(d), that failure does not warrant suppression as to them of their intercepted conversations. The Act identifies specifically the available grounds for a motion to suppress (18 U.S.C. 2518(10)(a)):

> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

Only the first is even arguably relevant here, and the plain meaning of that subsection manifestly fails to cover an interception that was entirely proper when it was made. In short, the Act does not permit suppression simply because of a technical error occurring after the interception has been completed.

Moreover, this Court has recently interpreted Title III's suppression provision as indicating that "Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures * * *." *United States* v. *Giordano*, *supra*, 416 U.S. at 527. However, not "every failure to comply fully with any requirement provided in Title III [will] render the interception of wire or oral

communications 'unlawful.'" *United States* v. *Chavez*, *supra*, 416 U.S. at 574-575. Since the post-use discretionary notice provision can hardly be considered to relate substantially to any congressional intention to limit the use of intercept procedures,[16] *Giordano* and *Chavez* indicate suppression was improper here.[17] The Court's observation in *Chavez* (416 U.S. at 572) that it did "not perceive any purpose to be served by deliberate misrepresentation by the Government in these circumstances" is fully applicable to this issue (see App. A, *infra*, p. 24a).[18]

Finally, even if there were any doubt as to the

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[16] As the dissenting judge below noted (App. A, *infra*, p. 22a):

> It is, therefore, difficult enough for me to conclude that the inventory notice provisions were intended to play a "central role" in "limiting the use of intercept procedures" where the statute specifically requires notice; it is even more difficult where notice is made discretionary and the alleged violation is not even mentioned in the statute.

[17] See, also, Commentary, *Standards Relating to Electronic Surveillance*, American Bar Association Project on Minimum Standards for Criminal Justice, p. 160 (Approved Draft, 1971) ("A failure * * * to file the inventory * * * should result in the suppression of evidence only where prejudice is shown").

[18] The duty imposed by the court below will not prevent the type of administrative error that occurred in this case—such errors are bound to occur during the investigation of complex cases, involving numerous persons who do their best to conceal their identities from the authorities. Moreover, since 39 persons were given notice here, and Lauer and Merlo filed motions to suppress promptly after the tapes were unsealed, there is no basis for any finding of prejudice.

statutory provisions discussed above, suppression for the post-intercept error involved here is precluded by the specific authorization for the disclosure at trial of communications, or evidence derived from communications, intercepted "by means authorized" by Title III. 18 U.S.C. 2517(3). An inadvertent administrative error made after the interception had been completed does not change the fact that the communications of Merlo and Lauer had been intercepted "by means authorized" by Title III.[19]

In sum, we submit that it is important for this Court to consider and affirm the governing standard as set forth by the dissent in the court of appeals (App. A, *infra*, p. 23a):

> I would limit suppression to those instances in which the government's violation was shown to be deliberate or where, if not deliberate, there is a showing of actual prejudice which cannot be cured by less drastic remedies such as compelling later disclosure or by permitting * * * "a reasonable opportunity to prepare an adequate response to the evidence which has been derived from the interception." [Citation omitted.]

3. In light of the fact that this case fully encompasses the issues presented in *Bernstein* (No. 74-1486) and presents additional important issues regarding the post-intercept notice requirements and the propriety of the suppression remedy for any vio-

[19] It may also be that admission of the incriminating statements of Merlo and Lauer is required by 18 U.S.C. 3501(a) and (e).

lations of such requirements, which issues also merit consideration by this Court and resolution of conflicting decisions with respect thereto by the courts of appeals, the Court may wish to hear this case plenarily and hold our petition in *Bernstein* for appropriate disposition in light of its decision here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1975.

APPENDIX A

No. 74-1553

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, APPELLANT

v.

THOMAS W. DONOVAN, DOMINIC RALPH BUZZACCO, VANIS RAY ROBBINS, JOSEPH FRANCIS MERLO AND JACOB JOSEPH LAUER, APPELLEES

Appeal from the United States District Court
for the Northern District of Ohio

Decided and Filed March 17, 1975, as amended
May 5, 1975

Before: PHILLIPS, Chief Judge, ENGEL, Circuit Judge, and CECIL, Senior Circuit Judge.

PHILLIPS, Chief Judge, delivered the opinion of the Court in which CECIL, Senior Circuit Judge, concurred. ENGEL, Circuit Judge, (pp. 15-21), delivered a separate opinion concurring in part and dissenting in part.

PHILLIPS, Chief Judge. This case involves the admissibility of evidence obtained through court-authorized telephone wiretaps. District Judge Robert

B. Krupansky suppressed evidence against the five named defendants-appellees on the ground that Government agents failed to comply with two statutory requirements. The Government appeals.

Essentially the basic question on this appeal is whether Congress meant what it said when it enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20, permitting court-authorized interception of telephone conversations under carefully prescribed restrictions.

In *United States* v. *Chavez*, 416 U.S. 562, 574-75 (1974), the Supreme Court said:

> "[W]e do not go so far as to suggest that every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful' . . . suppression is not mandated for every violation of Title III, but only if 'disclosure' of the contents of the intercepted communications, or derivative evidence, would be in violation of Title III."

We hold that the District Court correctly found that disclosure in the present case was a violation of Title III. We reject the Government's contention that non-compliance with the requirements of this statute can be condoned or excused on the theory that it was "inadvertent" and "unintentional" or constituted "mere technical violations."

I.

The first breach of the statute involves 18 U.S.C. § 2518(1)(b)(iv), which requires that each applica-

tion for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction which shall include, among other specified information, "the identity of the person, if known, committing the offense and whose communications are to be intercepted."

The District Court held that the defendants Donovan, Robbins and Buzzacco were "known to the Government within the meaning of the statute and that failure to include their names in the applications and orders contravenes the statute and necessitates the suppression of the contents of intercepted communications and the evidence derived therefrom as to these three defendants.

The second breach of the statute involves a failure to comply with the inventory requirements of 18 U.S.C. § 2518(8)(d), which provides that:

> "(d) Within a reasonable time but not later then ninety days after the filing of an application for an order of approval under section 2518 (7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—
>
> (1) the fact of the entry of the order or the application;
>
> (2) the date of the entry and the period of authorized, approved or disapproved in-

terception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed."

The District Court held that the defendants Merlo and Lauer were not served with notices of inventory and that in the interest of justice their communications must be suppressed.

These five defendants-appellees [1] were among seventeen persons indicted for their participation in an illegal gambling business. The two count indictment charged conspiracy and substantive violations of 18 U.S.C. §§ 371 and 1955. A large part of the evidence which supported these indictments was gathered pursuant to an order authorizing the interception of wire communications issued by the District Court on November 28, 1972. This order was granted upon application of the Organized Crime and Racketeering Section of the Department of Justice and after

[1] On January 18, 1974, the District Court ordered these five defendants severed from the remaining twelve for purposes of trial.

consideration of a forty-six page affidavit submitted by a special agent of the Federal Bureau of Investigation. The affidavit indicated that reliable informants had named certain persons engaged in illegal gambling activities and that this information was corroborated by physical surveillance and telephone company records.

The order, which was issued by Chief District Judge Frank J. Battisti, authorized special agents of the FBI:

> "To intercept wire communications of Albert Kotoch, Joseph Anthony Spaganlo, Ernest L. Chickeno, Raymond Paul Vara, George F. Florea, Suzanne Veres and others, as yet unknown concerning the above described offenses to and from the telephones [described in the order]."

This order terminated on December 12, 1972.

On December 26, 1972, an extension of the November 28 order was sought and approved. This new order dropped two of the four previously approved intercepts. In addition, an order authorizing intercepts for another telephone number was sought and approved. These orders terminated on January 5, 1973.

On February 21, 1973, the court ordered the service of inventory notice upon 37 individuals known to have been parties to the intercepted conversations, as required by 18 U.S.C. § 2518(8)(d). The Government subsequently checked its records and discovered that two additional parties should have been given notice. On September 11, 1973, an amended order

was filed which served inventory notice on the two additional parties. Neither submission to the District Judge named defendants Merlo and Lauer, although they were known to the Government as participants in the gambling activity whose communications had been intercepted.

II.

Congress has provided a statutory basis for suppression of wiretap evidence. 18 U.S.C. § 2515 prohibits the introduction of wiretap evidence or its fruits "if the disclosure of that information would be in violation of this chapter." The specific grounds for suppression are spelled out in 18 U.S.C. § 2518 (10) (a); an aggrieved person may move to suppress when:

> "(i) the communication was unlawfully intercepted;
> "(ii) the order of authorization or approval under which it was intercepted is sufficient on its face; or
> "(iii) the interception was not made in conformity with the order of authorization or approval."

In affirming an order to suppress pursuant to these provisions of the statute in *United States* v. *Giordano*, 416 U.S. 505, 527 (1974), the Supreme Court said:

> "[W]e think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device."

In *United States* v. *Chavez*, *supra*, 416 U.S. at 580, the Supreme Court held that Title III did not mandate suppression under the circumstances of that case, but said:

> "Though we deem this result to be the correct one under the suppression provisions of Title III, we also deem it appropriate to suggest that strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought."

III.

Title III requires that when the Government applies for a wiretap authorization, the "identity of the person, if known, committing the offense and whose communications are to be intercepted" must be disclosed specifically. 18 U.S.C. § 2518(1) (b) (iv).

There can be no doubt on the record before us that Donovan and Robbins were "known." The Government contends that Buzzacco was not "known," but, for the reasons hereinafter set forth, we agree with the District Court that the name of Buzzacco, along with the names of Donovan and Robbins, should have been disclosed to the District Judge.

Our concern in this case is whether an intercept of a conversation with three persons, known to be committing the crime for which the intercept is authorized, yet unnamed in the wiretap application

and order is "unlawfully intercepted" within the meaning of 18 U.S.C. § 2518(10)(a)(i).

Title III seeks to strike a balance between the mixed advantages and dangers of electronic surveillance. Those same features which make wiretaps so valuable as a weapon against the operations of organized crime also pose a substantial threat to individual privacy. To resolve the "tension between these two stated congressional objectives, . . . the starting point, as in all statutory construction, is the precise wording chosen by Congress in enacting Title III." *United States* v. *Kahn*, 415 U.S. 143, 151 (1974).

The literal language of the identification requirement leaves no question as to when the Government must specifically name the parties. Section 2518 requires that "each application *shall* include . . . the identity of the person, if known, committing the offense, and whose communications are to be intercepted." (Emphasis added.) This requirement is only one of the many specific steps that the Government must follow in order to obtain wiretap authorization, and is a procedural restraint on the use of wiretaps. In our opinion this is not a hollow requirement. It is an important part of the statutory framework that Congress formulated for protection against the dangers of electronic surveillance.

In *United States* v. *Bellosi*, 501 F.2d 833, 837 (D.C. Cir. 1974), the court said:

> "By asking us to refashion another clearly worded provision in Title III in a way that would somewhat ease another of the 'stringent conditions' with which a law enforcement agency must comply before conducting an interception, the Government effectively asks us to do what the *Giordano* Court would not. Section 2518(1) is no less important than Section 2516(1) to Congress' legislative scheme to allow only limited governmental interception of wire or oral communications. Section 2518(1) provides that the judge from whom interception authorization is sought be provided with a detailed and particularized application containing that information which Congress thought necessary to judicial consideration of whether the proposed intrusion on privacy is justified by important crime control needs. *See* United States v. United States District Court, 407 U.S. 297, 302, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972)."

By requiring the Government to make this disclosure Congress has made it possible for the courts to exercise strict control over communication intercepts. It is apparent that Congress intended § 2518(1) to impose "stringent conditions," thereby playing an integral role in the limitation of wiretap procedures and serving a substantial purpose in the statutory scheme to limit the indiscriminate or otherwise unauthorized use of wiretaps.

When this same provision was construed in *Kahn* the Court stated that "[t]his statutory language would plainly seem to *require* the naming of a specific person in the wiretap application" when the person is known to be committing the offense. 415 U.S. at 152. (Emphasis added.) Although the Court

did not require suppression in that case it was only because Mrs. Kahn was not "known" within the meaning of the provision. There is the clear implication that if she had been "known" suppression would have been required. Later that year, in *United States* v. *Giordano*, *supra*, the Court construed § 2516 (1) of Title III, requiring an Attorney General or a specially designated Assistant Attorney General to authorize the wiretap application. In that case suppression was also required because the mandatory pre-condition "was intended to play a central role in the statutory scheme." 416 U.S. at 528. Although the identity provision in the present case plays a different role in the statutory scheme than the provision in *Giordano*, we are of the opinion that it also plays "a central role."

Since Congress has imposed a clear requirement that the identity of the participants must be disclosed "if known," we are not concerned with the reason that these names were omitted from the application. In our view it makes no difference whether the omission was inadvertent or purposeful. The fact of omission is sufficient to invoke suppression. This omission of Government agents cannot be excused as "a mere technical violation."

We now come to the Government's contention that defendant Buzzacco was not "known" within the meaning of the statute.

The meaning of the term "if known" in 18 U.S.C. § 2518(1)(b)(iv) has been defined by the Supreme Court. In *Kahn*, *supra*, the Court concluded:

> "[T]hat Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that the individual is 'committing the offense' for which the wiretap is sought." 415 U.S. at 155.

See United States v. *Martinez*, 498 F.2d 464, 466-67 (6th Cir. 1974).

The District Court found:

> "Special Agent Ault, through a check of Ohio Bell Telephone Company records and execution of physical surveillances, became aware of defendant Buzzacco's identity and address in Niles, Ohio, subsequent to the first set of authorized wire interceptions. Agent Ault further testified that he was aware of Buzzacco's activity and believed he was involved in gambling activities prior to submission of the Affidavit on December 26, 1972."

The following factual background was developed to support these findings. During a ten week period in June and July 1972 ninety-one telephone calls placed by prime suspects in the case were traced to a Youngstown, Ohio, telephone number which was known to be listed under one of Buzzacco's aliases. The FBI knew from previous investigations that Buzzacco had a reputation for being a bookmaker. In the summer or fall of 1972 Buzzacco moved his place of operation to Niles, Ohio. The record is inconclusive as to the date that physical surveillance placed Buzzacco at the Niles address, although it may have been as late as December 29, 1972. Prior

to that time physical surveillance of that address had been conducted. In addition, telephone calls placing lay-off bets were intercepted between the other suspects and a person at the Niles number variously identified as "Buzz" or "Buzzer." At the hearing on the motion to suppress FBI Agent Ault, upon whose affidavit the wiretap orders were based, testified that he had "suspicions" that Buzzacco was involved in the gambling activities prior to the submission of the wiretap applications.

Our prior decisions clearly illustrate that these facts are adequate to demonstrate "a probability of criminal conduct." *Coury* v. *United States*, 426 F.2d 1354, 1356 (6th Cir. 1970). In *Coury* we affirmed a commissioner's finding of probable cause on the strength of an affidavit which stated that the investigating special agent:

> "had personally conducted an investigation of appellant, including surveillance of his home; that he knew appellant to be a bookmaker and a gambler, and knew of his prior conviction for bookmaking activities; also that telephone company records listed calls between appellant and known gamblers in other states. In addition, the Bishop affidavit cited telephone company records showing calls from another well-known gambler to appellant's home," 426 F.2d at 1356.

See also United States v. *Williams*, 459 F.2d 909 (6th Cir. 1972).

We, therefore, hold that at the time the applications for wiretaps were made the Government had probable cause to believe that Buzzacco was engaged

in the illegal gambling activities for which the intercept authorization was sought. He, therefore, should have been named in the application.

We, accordingly, affirm the order of the District Court granting the motions to suppress filed by Donovan, Robbins and Buzzacco.

IV.

Although the defendants Merlo and Lauer were not named in the wiretap application, during the course of the intercepts they were identified as parties to the communications. On February 21, 1973, the District Court ordered the service of inventory notice on 37 persons. After the Government checked its records it was found that two persons had been omitted from the original order. On September 11, 1973, when the District Court was informed of this omission, an amended order directing service of inventory notice was granted as to these two additional parties. Merlo and Lauer's names were never brought to the attention of the court, prior to the first or second order, or at any time thereafter. Consequently they have never been served with inventory notice.

The inventory notice provisions of Title III are set out in 18 U.S.C. § 2518(8)(d) and are quoted above. Since the inventory notice provision does not require on its face that notice must be served in all instances, the case presented by Merlo and Lauer involves a slightly different situation than the identification "if known" provision of Title III discussed previously. If the overheard parties have not been named in the order, as in the present case, "the judge may deter-

mine *in his discretion*" that inventory notice should be served "in the interest of justice." 18 U.S.C. § 2518(8)(d). (Emphasis added.) The judge has no independent information as to the unnamed parties who have been overheard on the intercepts and must depend on the Government to disclose that information in order that he may exercise his discretion.

We agree with the following holding in *United States* v. *Chun*, 503 F.2d 533, 540 (9th Cir. 1974);

> "[A]lthough the judicial officer has the duty to cause the filing of the inventory, it is abundantly clear that the prosecution has greater access to and familiarity with the intercepted communications. Therefore we feel justified in imposing upon the latter the duty to classify all those whose conversations have been intercepted, and to transmit this information to the judge. Should the judge desire more information regarding these classes in order to exercise his § 2518(8)(d) discretion, we also hold that the government is required to furnish such information as is available to it. It is our belief that this allocation of responsibilities between the executive and judicial branches of government will best serve the dual purposes underlying Title III." (Footnote omitted.)

Both Merlo and Lauer were overheard in the authorized interceptions and both subsequently were indicted.[2] The evidence in the intercepts was to be used

[2] This case does not present, and we do not reach, the question of the rights of unindicted persons to receive inventory notice. *See United States* v. *Whitaker*, 474 F.2d 1246 (3d Cir.), *cert. denied*, 412 U.S. 953 (1973).

against them. Even though the Government re-examined the records and amended the original inventory notice, Merlo and Lauer never received formal inventory notice. The District Court made a specific finding that "defendants Merlo and Lauer were not served with inventories pursuant to the act *or otherwise notified that they had been intercepted* . . . ." (Emphasis added.)

This finding demonstrates to our satisfaction that the District Court has considered and decided the issue of actual notice. We draw no inference from the fact that notice was given to 39 other persons, many of whom were known to Merlo and Lauer. Others may have communicated the fact of interception to Merlo and Lauer, but this would not necessarily lead them to believe that they had been intercepted. It is just as reasonable to assume that Merlo and Lauer would believe that, since they had not received notice, their conversations were not intercepted.

The only evidence of notice in the record is in response to Merlo's and Lauer's motions for discovery, filed after their indictments and more than a year after the actual interceptions. If these defendants had never been indicted, they might well have never received notice of the interceptions. The Government explains this omission on the basis of "an apparent lack of communication between the FBI and the prosecutor" although the defendants urge that "the government deliberately flouted and denigrated the provisions of Title III by secreting" the defendants' names. For the purpose of this analysis it is un-

necessary to determine which view is correct. Either the Government's deliberate circumvention, *see United States* v. *Eastman*, 465 F.2d 1057 (3d Cir. 1972), or an inadvertant error may require suppression. Although certain cases decided prior to *Giordano* and *Chavez* indicate that, in the absence of actual notice, the prejudice to the defendants is a factor to be considered, *see United States* v. *Cirillo*, 499 F.2d 873, 882-83 (2d Cir. 1974); *United States* v. *Wolk*, 466 F.2d 1143, 1146 (8th Cir. 1972), *Giordano* states that if the provision plays a "central role" that "suppression must follow when it is shown that this statutory requirement has been ignored." 416 U.S. at 529.[3]

Of the recent cases decided by the Supreme Court on the requirements of Title III the present case is most factually similar to *Giordano*. In *Giordano*, as in this case, there was no actual compliance with the statute. The unauthorized approval of wiretap orders, like the failure to serve inventory notice, are both factors which are not susceptible of a showing of prejudice. The factor which distinguishes this case from *Chavez* is that in *Chavez* the statute was in fact followed even though the wiretap orders appeared facially defective. There is no suggestion in the present case that the Government fulfilled its duty under the statute or that there was even a colorable conformity with the statutory requirements. Further, this is not a case where a strict interpretation of the

[3] For a general discussion of 18 U.S.C. §§ 2516 and 2518, *see United States* v. *Wac*, 498 F.2d 1227, 1230-32 (6th Cir. 1974).

statute would render the statute essentially useless for law enforcement purposes as in *United States* v. *Kahn*, 415 U.S. 143, 153 (1974).

From our examination of the legislative history of this provision, *see United States* v. *Chun*, *supra*, 503 F.2d at 537 n. 6, 539-40, 542 n.12, it is our conclusion that this provision plays a central role in the stautory scheme to limit and control electronic surveillance and that it "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary device." *United States* v. *Giordano*, *supra*, 416 U.S. at 527.

Suppression is required if there is a breach of a Title III provision that "directly and substantially implements" the congressional scheme to limit the use of electronic surveillance. We have determined previously that the Government had a duty to disclose the identity of Merlo and Lauer, and that this duty was breached. It is our view that the inventory notice provisions have a central role in limiting the use of intercept procedures. For these reasons we argee with the District Court that the communications of Merlo and Lauer were "unlawfully intercepted," 18 U.S.C. § 2518 (10)(a)(i), and that suppression is required.

The decision of the District Court is affirmed.

ENGEL, Circuit Judge (concurring in part and dissenting in part). While I agree that the district court properly suppressed the wiretap evidence as to defendants Donovan, Robbins and Buzzacco for the reasons stated in the majority opinion, I respectfully dissent from so much thereof as affirms the suppression of the wiretap evidence against defendants Merlo and Lauer because of violation of 18 U.S.C. § 2518 (8)(d). I would reverse and remand for reconsideration in the light of *United States* v. *Giordano*, 416 U.S. 505 (1974); *United States* v. *Chavez*, 416 U.S. 562 (1974) and certain guidelines which I believe this court should establish in the interpretation of the inventory notice provisions of the statute.

The Factual Background

Merlo and Lauer were not named in the wiretap applications, and their identity was not known at the time application for the interception was made on November 28, 1972, or when a continuation was approved on December 26, 1972. According to the testimony of Special Attorney Edwin J. Gale, twelve telephone conversations placed from the apartment under surveillance and received by Merlo and Lauer were intercepted between December 9, 1972 and January 3, 1973. On January 13, 1973, pursuant to a search warrant, a search was conducted by the FBI of the premises at 21 Olive Street, Akron, Ohio in the presence of both defendants. Evidence was seized as a result of the search and inventories therof were filed and served, at least upon Merlo. Statements

made by Merlo and Lauer at that time indicated that they had answered telephones located in the Olive Street apartment and that Merlo had employed Lauer as a phone man.

The defendants assert in their brief that "the contents of these intercepted communications (phone calls from the telephones under surveillance to Merlo and Lauer) were submitted by the government as probable cause for a search of the defendant's apartment on January 13, 1973." This assertion by defendants is not supported by the record, is denied by the government, and is not a fact found by the trial court. On the contrary, while the activities of Merlo and Lauer were unquestionably known to federal authorities from some time prior to January 13, 1973, the only evidence on the record indicating the date when the conclusion was reached that it was Merlo and Lauer who were parties to the twelve interceptions comes from the testimony of Special Attorney Gale, who placed the time as "late summer of 1973. Perhaps late August."

No inventory notice was ever served on either defendant. A sealed indictment naming both Merlo and Lauer as defendants was filed on November 1, 1973 and was unsealed November 6. On December 17, 1973 transcripts of the twelve interceptions were furnished by the government in response to a request by defendants. On January 17, 1973 District Judge Robert Krupansky suppressed the evidence, and on the following day entered an order severing the trials of Merlo, Lauer and the other appellees herein from

that of the remainder of the defendants, thus paving the way for this interlocutory appeal upon certification by the government pursuant to 18 U.S.C. § 3731.

Suppression Under the Statute

The appeal from the district court's suppression of the wiretap evidence presents the issue of whether failure to serve upon those defendants post-interception inventory notice violates the provision of 18 U.S.C. § 2518(8)(d), and if so, whether the violation requires suppression under 18 U.S.C. § 2518(10)(a). In the words of *United States* v. *Kahn*, 415 U.S. 143 (1974), " . . . . the starting point, as in all statutory construction, is the precise wording chosen by Congress in enacting Title III." 415 U.S. at 151.

Subsection (8)(d) of Section 2518 provides that the issuing judge "shall cause to be served, on the persons named in the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory . . . .". Under the statute, therefore, it was within the discretion of the judge to cause an inventory to be served upon Merlo and Lauer as "such other parties to intercepted communications." Since the judge will have no independent information and must depend upon the government to disclose the names of such other persons, I agree with the majority that the government, therefore, should have a duty on its own initiative to disclose to the judge the names of such persons known to it, even though such duty is not spelled out in the statute.

See *United States* v. *Chun*, 503 F.2d 533, 540 (9th Cir. 1974). I depart from the majority, however, when it holds in effect that a violation of the judicially created duty calls for suppression without regard to whether it was the result of a deliberate flouting of the statute, *United States* v. *Eastman*, 465 F. 2d 1057 (3rd Cir. 1972) or an inadvertent error, *United States* v. *Wolk*, 466 F. 2d 1143 (8th Cir. 1972), or whether there was actual prejudice to the defendants by reason thereof. Such a construction of the statute, in my view, goes well beyond *United States* v. *Chun*, *supra*, runs counter to standards for suppression set forth in *Giordano* and *Chavez*, and is similar to the overly restrictive approach to statuory interpretation which was rejected in *United States* v. *Kahn*, *supra*.

Chavez and *Giordano* set out the standards for suppression under 18 U.S.C § 2518(10)(a)(i). As noted by the court in *Chavez*, *Giordano* "did not go so far as to suggest that every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful'." *Chavez*, *supra*, at 474, 475. Rather, the court in *Giordano* noted: ". . . Congress intended to require suppression where there is a failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to *limit the use* of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." (emphasis added) *Giordano*, *supra*, at 527.

In considering whether we should apply the suppression provisions of 18 U.S.C §2518(10)(a)(i) to violations of the post-interception inventory notice provisions of 18 U.S.C. § 2518(8)(d), it is necessary to recognize that since the interception has already occurred, the service of inventory afterward has little, if anything to do with deterring improper initial resort to the procedure. The language " 'unlawfully intercepted' must be 'stretched' " to include failures of conditions subsequent to a valid authorization and execution, *Chun, supra,* at 542, n. 18. It is, therefore, difficult enough for me to conclude that the inventory notice provisions were intended to play a "central role" in "limiting the use of intercept procedures" where the statute specifically requires notice; it is even more difficult where notice is made discretionary and the alleged violation is not even mentioned in the statute. Nevertheless, a judicial interpretation of the statute which imposes a duty on the government to disclose to the judge the names of persons later identified as parties to intercepted communications is reasonable, consistent with the needs of the judge it he is to exercise his statutory discretion and in keeping with the spirit and intent of the Act. 1968 U.S. Cong. and Adm. News 2184. See also Commentary to Standard No. 5.15, tentative draft of American Bar Association Minimum Standards for Criminal Justice for Electronic Surveillance, proposed June 1968, at pages 161-162.

I agree that if the duty created is to have any meaning it is reasonable to attach consequences to its violation which discourage abuse and protect against

resulting injury. I do not agree that the langauge of the statute compels suppression as the invariable judicial vehicle of enforcement. I would limit suppression to those instances in which the government's violation was shown to be deliberate or where, if not deliberate, there is a showing of actual prejudice which cannot be cured by less drastic remedies such as compelling later disclosure or by permitting, in the words of *Chun,* "a reasonable opportunity to prepare an adequate response to the evidence which has been derived from the interception." *Chun, supra,* 503 F.2d at 538.

The facts in this case, and indeed in most reported cases involving widespread organized crime, readily illustrate the complexity of investigations which frequently involve not only different investigative agencies of the federal government, but state law enforcement agencies as well. See e.g., *United States* v. *Cirillo,* 499 F. 2d 871 (2nd Cir. 1974), *cert. denied* 43 U.S.L.W. 3330. The knowledge of one law enforcement officer, or of even a single agency, can rarely be expected to encompass the knowledge of the whole. The identification of parties to telephone conversations by voice is difficult at best. It is infinitely more difficult when the parties are guarded in their remarks, or refer to one another by code name or nickname. Unless the Constitution or the express language of the statute commands otherwise, I believe we are obliged to construe the governmental duty consistently with the dual objectives of the Act:

"To be sure, Congress was concerned with protecting individual privacy when it enacted this statute. But it is also clear that Congress intended to authorize electronic surveillance as a weapon against the operations of organized crime."

(Footnote omitted)

United States v. *Kahn, supra,* at 151

If the foregoing guidelines are applied here, the decision of the district court cannot stand upon the record made and upon the limited findings of the district court.

There is nothing in the record here to suggest that the failure to notify the issuing judge of the names of Merlo and Lauer was anything but inadvertent. Notice was given not only to 37 persons by court order of February 21, 1973, but to two additional persons on September 11, 1973. This itself is a strong indication that the government was not indifferent to its obligations to make later disclosure. No tactical advantage to the government is even suggested in view of the widespread disclosure to others allegedly involved in the conspiracy.

Likewise, I view any possibility of actual prejudice highly doubtful upon the record here. The majority concludes, erroneously I think, that 'this finding demonstrates to our satisfaction that the District Court has considered and decided the issue of actual notice.'" Actually the record shows only that the inventory notice was never sent them, and the district court finding is limited to the observation of "the government's admission that defendants Merlo

and Lauer were not served with inventories pursuant to the Act or otherwise notified that they have been intercepted". I do not conclude from this finding, however, that the district judge found, or the facts revealed, that the defendants had no prior actual knowledge whatever of the interceptions. Thirty-nine of the alleged participants had already been formally notified. Because of the January search of their apartment, Merlo and Lauer already knew in the most concrete terms that their activities, and in particular telephone activities, were under FBI scrutiny. They may not have had direct or indirect notice from the government, but it challenges credulity to conclude therefrom that they did not have some actual knowledge of the interceptions.

The duty to notify Merlo and Lauer arose in late August when, according to Gale, their identity was first known. They were then, in the discretion of the judge, entitled to an inventory, including notice of the facts and dates prescribed in 18 U.S.C. § 2518 (8)(d)(1), (2) and (3). This information does not, however, necessarily include either transcripts of the tapes themselves or even the dates or particulars of individual conversations. As indicated earlier, indictment followed about two months later, and full disclosure of the transcripts themselves some six weeks after that. Further, the defendants were still entitled to protection of the ten-day rule of § 2518 (9). Since this appeal is itself interlocutory, they cannot claim that they have been put to trial without "reasonable opportunity to prepare an adequate re-

sponse". *Chun, supra,* at 538. They are, therefore, in a far more advantageous position than was defendant Venuetucci in *United State* v. *Cirillo, supra.* There Venuetucci did not actually learn of the interceptions of tapes involving his own conversations until the day they were introduced at his trial. The interceptions had been procurred under the New York wiretap law which had been enacted following *Berger* v. *New York,* 388 U.S. 41 (1967). Nevertheless, the Second Circuit, while agreeing with the government should have produced the tapes earlier, found their admission not to be reversible error where failure to make earlier disclosure was the result of oversight, no continuance was sought, and the defendant's claims of actual prejudice bordered on the frivolous. *United States* v. *Cirillo, supra,* at 882-883.

Conclusion

This area of law is both novel and difficult and neither the trial court nor counsel have been furnished with much appellate guidance in working out the very real problems which arise under the statute. For that reason, I would vacate the order suppressing the wiretap evidence relating to Merlo and Lauer, and remand to the district court for reconsideration in the light of the foregoing observations, leaving it to the district judge to determine whether, in connection therewith, any further evidentiary hearing may also be required.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-1553

[Filed Mar. 17, 1975, John P. Hehman, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

THOMAS W. DONOVAN, DOMINIC RALPH BUZZACCO, VANIS RAY ROBBINS, JOSEPH FRANCIS MERLO AND JACOB JOSEPH LAUER, DEFENDANTS-APPELLEES

Before: PHILLIPS, Chief Judge, ENGEL, Circuit Judge, and CECIL, Senior Circuit Judge.

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF. It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

A True Copy.
Attest:

_____

John P. Hehman
Clerk

Issued as Mandate:
COSTS: NONE

Filing fee .....$
Printing $
Total $

A TRUE COPY

Attest:

JOHN P. HEHMAN
Clerk

By /s/ Betty Tibbles
Deputy Clerk

[SEAL]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-1553

[Filed Jun. 12, 1975, John P. Hehman, Clerk]

UNITED STATES OF AMERCIA, APPELLANT

v.

THOMAS W. DONOVAN, DOMINIC RALPH BUZZACCO, VANIS RAY ROBBINS, JOSEPH FRANCIS MERLO AND JACOB JOSEPH LAUER, APPELLEES

ORDER DENYING PETITION
FOR REHEARING

Before PHILLIPS, Chief Judge, ENGEL, Circuit Judge, and CECIL, Senior Circuit Judge.

No judge of the court having moved for rehearing in banc, and the petition for rehearing having been considered by the panel, it is ORDERED that the rehearing be and hereby is denied. Judge Engel would grant rehearing as to defendants Merlo and Lauer, for the reasons stated in his dissenting opinion.

Entered by order of the court.

/s/ John P. Hehman
Clerk

A TRUE COPY

Attest:

JOHN P. HEHMAN
Clerk

By /s/ Betty Tibbles
Deputy Clerk

[SEAL]

APPENDIX D

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR73-600

[Filed Jan. 17, 5:48 PM '74, Clerk U.S. District Court, Northern District of Ohio]

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALBERT KOTOCH, ET AL, DEFENDANTS

MEMORANDUM AND ORDER

KRUPANSKY, J.

This criminal proceeding results from a two-count Indictment returned by the Grand Jury charging the seventeen named defendants with a conspiracy and substantive violations of 18 U.S.C. § 1955 in conducting, financing, managing, supervising, directing, and owning all or part of an illegal gambling business involving five or more persons for a period in excess of thirty days and having a gross revenue of $2,000 on one or more single days and in violation of the laws of the State of Ohio.

The defendants have filed various Motions the thrust of each, broadly interpreted, is to suppress the use at trial of certain evidence resulting from electronic surveillance of specific telephone numbers

and articles of physical evidence seized during searches conducted by law enforcement authorities.

During the two days of evidentiary hearings conducted by the Court each defendant was permitted to incorporate and adopt any and all of the legal arguments, testimony and exhibits of the other defendants which could inure to his benefit, thus the consideration of each argument shall, unless otherwise stated, apply to each defendant.

During the investigation of the case, the Government collected extensive information by the use of wiretaps. Defendants assert that:

1. The provisions of Title III of the Omnibus Crime Control Act of 1968 violate the Fourth Amendment guarantee against unreasonable searches and seizures;

2. Insufficient compliance by the Government with the procedural and substantive requirements of 18 U.S.C. §§ 2510-2520, culminated in violations of defendants' Fourth and Fifth Amendment rights.

This Court joins with the majority of courts in holding the provisions of Title III of the Omibus Crime Control Act of 1968 constitutional. The safeguards provided by Title III clearly reflect Congressional effort to comply with the pronouncements of the Supreme Court in *Katz* v. *United States*, 389 U.S. 347 (1967); *Berger* v. *New York*, 388 U.S. 41 (1967); and *Osborn* v. *United States*, 385 U.S. 323 (1967), in order to prevent abuses through electronic

surveillance. *United States* v. *Bobo*, 477 F. 2d 974 (4th Cir. 1973); *United States* v. *Iannelli*, 477 F. 2d 999 (3rd Cir. 1973), U.S. App. pndg.; *United States* v. *Whitaker*, 474 F. 2d 1246 (3rd Cir. 1973), *cert. denied*, 93 S. Ct. 3003 (1973); *United States* v. *Fino*, 478 F. 2d 35 (2nd Cir. 1973), U.S. App. pndg.; *United States* v. *Cafero*, 473 F. 2d 489 (3rd Cir. 1973), U.S. App. pndg.; *United States* v. *Best*, 363 F. Supp. 11 (S.D. Ga. 1973); *United States* v. *Curreri*, 363 F. Supp. 430 (D. Md. 1973), *United States* v. *Bobo*, *supra* at 981 Note 5.

Consideration of defendants' charges challenging the Government's procedural and substantive compliance with statutory mandates dictates a review of the facts and circumstances of the investigation preliminary to the return of the Indictment.

All parties concede that during the morning of November 28, 1972, Steven R. Olah, an attorney assigned to the Strike Force, and Richard L. Ault, Jr., a Special Agent of the FBI, appeared before the Honorable Frank J. Battisti, Chief Judge of the United States District Court for the Northern District of Ohio, and presented an Application seeking authorization to intercept wire communications of Albert Kotoch, Joseph Spaganlo, Ernest L. Chickeno, Raymond Paul Vara, George M. Florea, Suzanne Veres and other unknown individuals concerning enumerated violations arising pursuant to 18 U.S.C. §§ 371 and 1955 (Defendant Spaganlo's Exhibit A). Attached to the said Application as Order No. 495-72 was a duly executed Temporary Special Designation

of Assistant Attorney General in Charge of the Criminal Division to Authorize Applications for Court Orders Authorizing Interception of Wire or Oral Communications signed by Richard G. Kleindienst, Attorney General, and dated November 8, 1972. The Order was to be effective during the Attorney General's absence from the country from November 12, 1972 to November 26, 1972; a letter dated November 22, 1972, signed by Henry E. Petersen, the Assistant Attorney General, Criminal Division, to William S. Lynch, Chief, Organized Crime and Racketeering Section, authorizing presentment of an Application to a Federal Judge for an Order under 18 U.S.C. § 2518, authorizing the interception of wire communications for a fifteen day period to and from the telephones bearing numbers 216-777-0850 and 216-777-0851 located at Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and numbers 216-453-6114 and 216-452-1624 located at 204 Broad Avenue, Northwest, Canton, Ohio, in connection with an 18 U.S.C. §§ 371 and 1955 investigation of the hereinbefore listed individuals; a letter of notification signed by William S. Lynch dated November 24, 1972, to David Margolis, Attorney-in-Charge, Cleveland Strike Force, Cleveland, Ohio, advising him of the Attorney General's approval to proceed with the presentation.

Also presented to Judge Battisti in support of the Application was a 46-page Affidavit in which Richard L. Ault, Jr. was the affiant.

Without conflict, the testimony reflects that Judge Battisti carefully examined both the Application and the Affidavit subsequent to which he administered an oath to Steven Olah who thereafter signed the Application. The Judge thereupon duly executed the jurat by affirming Olah's signature at 9:45 a.m.

Judge Battisti administered a separate oath to Special Agent Ault who attested to the truth and accuracy of the facts asserted in the 46-page Affidavit subsequent to which Judge Battisti affixed his signature to the jurat of the Affidavit at 9:50 a.m., an Order Authorizing Interception of Wire Communications at 9:52 a.m., an Order Authorizing the Use of Pen Registers or Touch Tone Decoders at 9:56 a.m., and a Sealing Order at 9:58 a.m.

At the evidentiary hearing of January 14, 1974, it was first discovered that the Affidavit filed and sworn to by Special Agent Ault on November 28, 1972, had not been signed by him during the exchange and execution of the many documents in Judge Battisti's chambers.

In any event, Judge Battisti sealed all of the documents into a manila folder and placed the sealed folder and its contents in his personal office safe. (Battisti's notation and seal—defendant Spaganlo's Exhibit A).

Judge Battisti's Order Authorizing Interception of Wire Communications presumes a preliminary affirmative finding by him of probable cause to believe that a particular offense had been, or was about to be committed; that there was probable cause

for belief that communications concerning the offense would be intercepted; that normal investigative procedures had failed or reasonably appeared likely to fail; and that there was probable cause for belief that the place to be tapped was used in connection with the offense, or was leased to, listed in the name of, or commonly used by, the person or persons involved in the offense. The findings were supported by information reflecting:

1. the identity of the applicant and the person authorizing the Application;

2. a detailed pronouncement of the facts and circumstances relied upon by applicant to justify his belief that the Order should issue, delineating with particularity the type of offense being investigated, a description of the place where the interception was to be made, the type of communications and the identity, if known, of the person or persons committing the offense and whose communications were to be intercepted. *United States* v. *Bynum*, 485 F. 2d 490 (2nd Cir. 1973); *United States* v. *Tortorello*, 480 F. 2d 764 (2nd Cir. 1973), U.S. App. pndg.; *United States* v. *Best*, 363 F. Supp. 11 (S.D. Ga. 1973); *United States* v. *Focarile*, 340 F. Supp. 1033 (D. Md. 1972); *United States* v. *Leta*, 332 F. Supp. 1357 (M.D. Pa. 1971);

3. a complete explanation as to why normal investigative procedures were not being employed.

United States v. *Bobo, supra; United States* v. *Focarile, supra; United States* v. *Falcone*, 364 F. Supp. 877 (D. N.J. 1973); *United States* v. *Bleau*, 363 F. Supp. 438 (D. Md. 1973);

4. the period for which the interception would be required to be maintained; and

5. any history of previous authorization Applications involving the same persons or places involved in the present Application.

Upon review of the pertinent documents contained in defendant Spaganlo's Exhibit A, this Court supports Judge Battisti's initial findings of probable cause and his Order of authorization issued November 28, 1972.

On December 4, 1972, Olah filed a Progress Report which was sealed by Judge Battisti and placed into a manila envelope and thereafter into his office safe. (Defendant Spaganlo's Exhibit B).

On December 8, 1972, Olah filed a second Progress Report which was sealed by Judge Ben C. Green in a manila envelope and placed into Judge Battisti's office safe. (Defendant Spaganlo's Exhibit C).

On December 14, 1972, Judge Battisti signed an Order sealing the recording of the intercept authorized on November 28, 1972, and which was terminated on December 12, 1972, and placed such recording in the protective custody of John T. Burns, Special Agent-in-Charge, FBI, Cleveland, Ohio. This

Order was sealed and placed in the Judge's office safe. (Defendant Spaganlo's Exhibit D).

On December 26, 1972, Olah and Agent Ault appeared before Judge Leroy J. Contie, Jr. and filed an Application for Extension requesting authority to continue interceptions over the telephones numbered 216-777-0850 and 216-777-0851. The Application was signed under oath by Olah and the jurat executed by Justice Contie. Attached to the Affidavit was a letter of authorization signed by Richard G. Kleindienst, Attorney General, dated December 2, 1972, addressed to Henry E. Petersen, Assistant Attorney General, Criminal Division, and a letter from the latter to David Margolis, Attorney-in-Charge, Cleveland Strike Force, Cleveland, Ohio, transmitting the Attorney General's authority to proceed dated December 22, 1972.

Special Agent Ault attested under oath, administered by Judge Contie, and signed two Affidavits filed with the Application.

Upon findings of probable cause, Judge Contie issued an Order Authorizing Continued Interception of Wire Communications, an Order Authorizing the Continued Use of Pen Registers or Touch Tone Decoders, and a Sealing Order.

Upon review of the Application and related documents, this Court concludes a compliance with criteria heretofore discussed and concurs with Judge Contie's findings of probable cause. *United States* v. *Bynum, supra; United States* v. *Bobo, supra; United States* v. *Tortorello, supra; United States* v. *Mainello*, 345 F. Supp. 863 (E.D. N.Y. 1972).

The executed documents were sealed in a manila envelope and retained in Judge Contie's custody. (Defendant Spaganlo's Exhibit E).

At the same time on December 26, 1972, Olah presented to Judge Contie an Application seeking authority to intercept wire communications of Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others, then unknown to and from the telephone numbered 216-777-3850 located at Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, subscribed to by Richard Wellman. This application had attached two letters of authorization to proceed from Attorney General Richard G. Kleindienst and Assistant Attorney General Henry E. Petersen. Supporting the Application were two duly executed Affidavits sworn and signed before Judge Contie by Special Agent Ault.

This Court, upon review of the Applications and supporting documents, concurs with Judge Contie's findings of probable cause preliminary to his Order Authorizing Interception of Wire Communications, and Order Authorizing the Use of Pen Registers or Touch Tone Decoders. The documents were sealed in a manila envelope and kept in Judge Contie's custody pursuant to this Order. (Defendant Spaganlo's Exhibit F). *United States* v. *Bynum, supra; United States* v. *Bobo, supra; United States* v. *Tortorello, supra.*

On December 29, 1972, Olah filed a Progress Report with Judge Contie who Ordered it sealed and

retained in his custody. (Defendant Spaganlo's Exhibit G).

On January 5, 1973, Olah filed a second Progress Report with Judge Contie who Ordered it sealed and retained in his custody. (Defendant Spaganlo's Exhibit H). On the same date the Judge Ordered the recordings from the interception which terminated on January 4, 1973, placed in the protective custody of Special Agent-in-Charge, FBI, Cleveland District. This Order was sealed in a manila envelope and retained by Judge Contie. (Defendant Spaganlo's Exhibit I).

On February 21, 1973, Judge Battisti, pursuant to the Government's Application, Ordered the service of inventory resulting from his Order of November 28, 1972, upon the certain designated individuals. (Defendant Spaganlo's Exhibit J). This Order was sealed by Judge Battisti and placed in his office safe.

On April 3, 1973, Olah presented an Application to Judge Battisti pursuant to the written authority of the Attorney General as communicated in writing by the Assistant Attorney General seeking to extend the use of information obtained as a result of the Judge's Order dated November 28, 1972, to other proceedings pursuant to 18 U.S.C. § 2517(5). The Application was attested and subscribed by Olah before Judge Battisti whereupon an Order of Approval was granted, all of which were sealed in a manila envelope and placed in the Judge's office safe. (Defendant Spaganlo's Exhibit K).

On September 11, 1973, Judge Battisti granted the Government's Motion for Amended Order Directing

Service of Inventory which was sealed in a manila envelope retained by the Judge. (Defendant Spaganlo's Exhibit L).

The evidence disclosed that on August 28, 1973, pursuant to an Order signed by Judge Contie, Edwin J. Gale, a Strike Force attorney, obtained all of the documents related to the November 28, 1972, proceedings from Judge Battisti and the documents related to the proceedings of December 26, 1972, before Judge Contie (defendant Spaganlo's Exhibits A, E, and F) took them to the Xerox room where he broke the seal on each of the envelopes and duplicated certain signature pages which were requested by the Department of Justice Washington, D. C. Thereafter, he replaced the documents into their proper envelopes and returned them to Judge Contie, who took Exhibits E and F into his custody, placed Exhibit A and its contents into a larger manila envelope (Government's Exhibit 2 and secured all three envelopes in his desk drawer.

On November 28, 1973, Joseph Benik, the Deputy Clerk of Courts, requested the presence of Gale in the Clerk's Office. After his arrival Judge Battisti's law clerk arrived with between 25 and 40 manila envelopes and Gale was directed by the Deputy Clerk to identify the envelopes related to the case at bar which were authorized to be unsealed by Order of this Court dated November 26, 1973. During this conference, Gale was directed to Judge Contie's chambers where he received a number of manila envelopes including defendant Spaganlo's Exhibits E, F, and J

from the Judge's law clerk all of which he carried to the Clerk's Office where he proceeded to separate and unseal the envelopes at a desk that had been assigned to him by the Deputy Clerk. During the initial examination of the envelopes, it was determined that defendant Spaganlo's Exhibits A, E, F, G, and J were unglued or unsealed. The evidence further disclosed that all documents in each of the unsealed envelopes were intact and in good order. The evidence failed to disclose that either the integrity or confidentiality of any document had been violated, to the contrary, it affirmatively appears that all of the documents here in question were in the possession, custody and control of either Judges Battisti or Contie from the time of their execution until presented in the Clerk's Office on November 28, 1973, with the exception of Exhibits A, E, and F which were unsealed by Gale on August 28, 1973, pursuant to Judge Contie's Order to permit duplication of certain signature pages, and thereafter immediately returned to his custody.

While defendants' Motions can best be considered separately, a review of existing precedent common to all Motions is required for an orderly understanding, consideration and disposition of the contentions advanced.

The gravamen of all Motions is Fourth Amendment infringements evolving from illegal searches and seizures arising from the electronic surveillance initiated on November 28, 1972, and continued and extended thereafter.

The subject of electronic surveillance has been the subject of comment by the Supreme Court in several

landmark cases. Thus, through the explicit language of the Amendment itself and the cases interpreting it, it is commonly accepted that the Fourth Amendment means what it says—unreasonable searches are prohibited. In the same context, the Courts have recognized that the requirements of the Fourth Amendment are not inflexible or obtusely unyielding to the legitimate needs of law enforcement. *Osborn* v. *United States*, 385 U.S. 323, 330 (1967); *Ohio ex rel Eaton* v. *Price*, 364 U.S. 263 (1963) (separate opinion). It is, then, with an eye toward implementing the Fourth Amendment's goal of securing the sanctity of personal privacy and at the same time accommodating the legitimate ends of law enforcement, that the Court must view the challenged provisions of the Omnibus Crime Control Act of 1968 and possible abuses arising thereunder. Thus, in *Berger*, *supra*, the Court considered the constitutionality of a New York permissive eavesdrop statute. Although *Berger* struck down the New York statute, the Court made it explicitly clear that electronic surveillance is permissible when judicially authorizing under the most precise and discriminating circumstances which meet the requirements of the Fourth Amendment. *Osborn*, *supra*. In *Katz*, *supra*, as well as in *Berger*, *supra*, the Supreme Court enumerated certain safeguards without which an authorization for the interception of wire or oral communications may not be valid. Those mandatory requirements demanded:

1. a neutral and detached judicial authority to be interposed between the Government and the public;
2. a showing of probable cause that a particular offense has been or is being committed;
3. the communications, conversations, or discussions sought to be intercepted be described with particularity;
4. the period during which the interception is authorized be specifically limited to insure against a series of intrusions pursuant to a single showing of probable cause;
5. prompt execution of the Order;
6. separate showing of probable cause for extentions or renewals of the Order;
7. a prompt termination of the interception once the conversation sought is seized;
8. a showing of special facts to excuse the lack of notice occasioned by necessary secrecy;
9. a provision providing for a prompt return which must be made describing the seized intercepts.

The purpose of the Crime Control Act was not only to authorize certain limited electronic surveillances, but also to correct and prevent many of its abuses in the sphere of private as well as criminal investigations. *Gelbaro* v. *United States*, 92 S. Ct. 2357 (1972); *United States* v. *Bobo*, *supra*.

A comprehensive examination and analysis of the moving papers including the Application and Affidavit submitted to Judge Battisti on November 28, 1972, and his subsequent Orders issued as a result thereof and the moving papers submitted to Judge Contie including the Applications and Affidavits and the Orders resulting therefrom reflect substantive and procedural compliance with both the Crime Control Act as well as Supreme Court pronouncements. This conclusion results in the face of an awareness by the Court of Special Agent Ault's failure to physically affix his signature to the Affidavit filed with the Application of November 28, 1972, subsequent to attesting to its truth and accuracy under oath administered by Judge Frank J. Battisti.

The object of a signature or mark is to identify the person swearing to the affidavit, it being essential that an affidavit sufficiently identify such individual. Consequently, the practice has long been settled and uniform that an affiant should sign his affidavit. However, it is generally held that in the absence of statute or rule of court to the contrary, a signature is not essential where the identity of the affiant as such is otherwise sufficiently shown, as where he is named in the jurat or where the affidavit commences with his name and where evidence supports the administration of an oath and attestation to the truth and accuracy of the facts alleged in the affidavit.

Title III of the Act and related sections of the United States Code reflect no provision requiring the affixing of signatures to affidavits.

Defined, an "affidavit" is a statement or declaration reduced to writing and sworn to or affirmed before some officer who has authority to administer an oath for affirmation; a statement of fact which is sworn to as the truth. Thus, where, as here, it is affirmatively shown that the truth of the declarations contained in the written document-styled affidavit was sworn to and attested as true before an officer authorized to administer an oath, namely, a judge of the Federal court, defendants' contention that the failure of the affiant to sign the affidavit renders it a nullity is not well taken. 3 Am. Jur. 2d Affidavits §§ 1, 15; 2A C.J.S. Affidavits §§ 2, 28.

Comparative analysis of 18 U.S.C. § 2518(8)(a) and (b) reflects a less demanding compliance with sealing requirements of (b) which attach to the working papers related to this case when compared with the more stringent sealing requirements applying to transcription resulting from the interceptions as provided by (a) of the above section.

Title 18 U.S.C. § 2518(8)(b) provides as follows:

> Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

The apparent purpose of the sealing requirements appear from its legislative history as recognized by

the United States Court of Appeals, Third Circuit, in *United States* v. *Goodwin*, 470 F. 2d 893 (1972), *cert. denied*, 411 969 (1973):

> The section was designed to ensure that the orders and applications are treated confidentially. Moreover, the limitations on disclosure in the last sentence of the section indicate that the congressional concern for confidentiality underlay the section. Since the agent made the application and was privy to the orders and since there is no evidence that he disclosed their content to anyone else after leaving the judge's chambers, his sealing the documents immediately after leaving the chambers would not be a breach of confidence. Nor would his storing the documents violate the statute, since it specifically states that custody shall be wherever the court directs. Thus, when § 2518(8)(b) is read in the light of its legislative purpose, it is apparent that the procedures followed in this case were not erroneous. While it would have been more appropriate, and we recommend it for the future, for the judge rather than the agent to have sealed the documents, his sealing would not have added to the confidentiality of the documents.

As hereinbefore stated the evidence fails to indicate or infer any breach of confidentiality or violation of integrity of any of the working papers here involved. *See also, United States* v. *Iannelli, supra.*

Title 47 U.S.C. § 605 provides in part as follows:

> Except as authorized by chapter 119, T. 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communcations by wire or radio

> shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communication centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena, issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. . . .

Defendants' urge that disclosure of toll call records to the Federal Bureau of Investigation without authority of subpoena or summons constitutes an invasion of privacy prohibited by the Fourth Amendment and *Katz* v. *United States, supra.* While certain broad language in *Katz* may appear to support the defendants' position, this Court upon a more thorough examination of *DiPiazza* v. *United States,* 415 F. 2d 99 (6th Cir. 1969), *cert. denied,* 402 U.S. 949 (1971); and *United States* v. *King,* 335 F. Supp. 523 (S.D. Cal. 1971), rev'd on other grounds 478 F. 2d 494 (9th Cir. 1973), U.S. App. pndg., reconsiders its comment as to the applicability of this authority during the course of the evidentiary hearing and adopts the dictum of *DiPiazza* at pages 103-104 wherein Judge Phillips in delivering the opinion of the Court stated:

> The appellants contend that the toll records could only be obtained under a search warrant,

> citing Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed. 2d 700 (5th Cir.). We find this contention without merit. Katz was an electronic surveillance case in which the Government eavesdropped on telephone conversations. The Court said, "One who occupies [a telephone booth] * * *, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouth piece will not be broadcast to the world." 389 U.S. at 352, 88 S. Ct. at 511. He is not entitled to assume that the fact that he is making a call will be a secret. Similarly one who uses a telephone to make a long distance calls is not entitled to assume that the telephone company will require a warrant before submitting its records in response to an IRS summons.

Accordingly, the Court concludes that a request by an FBI agent for the voluntary production of toll call records constitutes a demand of other lawful authority within the meaning of § 605. *United States* v. *King, supra.*

Accordingly, in considering the joint Motion of Joseph Anthony Spaganlo, Jack Lorenzetti and Michael Malvasi, the Court concludes:

1. Allegation No. 1 is overruled for the reasons hereinbefore set forth at p. 2, ¶ 3;

2. Allegations of unconstitutionality set forth in Allegation No. 2 is overruled and in particular the Court finds as to the following subsections:

   a. The Order for the original wiretap including the Application for an Extension thereof as

well as the Application for Interception of Communications on an additional telephone at the same location and all moving papers related thereto were in substantive and procedural compliance with the requirements of the Act, as well as the pronouncements of the Supreme Court, and no constitutional infringements arose thereunder;

b. Adequate monitoring safeguards were instituted and in effect during the period of interception to insure against interference with personal conversations unrelated to the purpose of the investigation and such monitoring was minimized contrary to the allegations of (b); *United States* v. *Fino, supra; United States* v. *Bynum, supra; United States* v. *Tortorello, supra.*

c. The allegations set forth in Spaganlo's Motion styled (c), (d), (e), (f), (g), (h), (i), (j), & (l) are without merit and are, therefore, overruled:

d. For the reasons hereinbefore set forth, the Court finds as to (k) that the confidentiality and integrity of the moving papers were not violated nor the defendants prejudiced in any way by the broken seals on defendant Spaganlo's Exhibits A, E, F, G, and J;

3. The evidence fails to disclose any misrepresentations of fact made to the Court or contained in any progress report filed with the Court pur-

suant to § 2518(6)(n) with respect to information derived from the original interception and extensions thereof.

The joint Motion of Spaganlo, Lorenzetti and Malvasi is overruled in its entirety.

Upon consideration of the Joint Motion of Harvey Trifler, Ernest Chickeno, George Frank Sidoris, Joseph Slyman, James Neil Girard, Thomas W. Donovan and Albert Kotoch to Controvert Search Warrants, Return Evidence Seized and Suppress Wiretaps, the Court finds that the thrust of the Motion emanates from the Government's alleged failure to conform with the procedural and substantive requirements of both 18 U.S.C. §§ 2510-20 and 47 U.S.C. § 605. The Court having heretofore considered both issues here involved, and absent evidence of impropriety in the execution of the search warrants, the Court finds sufficient evidence of probable cause to support the warrants and the Motion is therefore overruled. Fed. R. Crim. P. 41; *See Spinelli* v. *United States*, 393 U.S. 410 (1968); *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Coury* v. *United States*, 426 F. 2d 1354 (6th Cir. 1970).

Considering the separate Motion of James N. Girard for the Return of Seized Property pursuant to Fed. R. Crim. P. 41, the Court finds that the property seized falls within the description of the Warrant and thus the Motion is without merit and is overruled.

Upon consideration of the Motion of defendants Joseph Slyman and James Girard to Suppress Evi-

dence seized on January 13, 1973, at 1814 Saratoga Avenue, Cleveland, Ohio, absent evidence of impropriety in the execution of the search warrants, the Motion is overruled. Fed. R. Crim. P. 41(e).

Regarding the Motion of Vanis Ray Robbins to Suppress and Request for Oral Hearing and Argument, the Court has heretofore determined that the Applications and Orders dated November 28, 1972, complied with all provisions of the Act including 18 U.S.C. § 2516(1) and Supreme Court pronouncements, and thus the first allegation in the Motion is overruled.

Defendant Robbins further alleges that the Application and Order of December 26, 1972, fails to include his name in violation of 18 U.S.C. § 2518(4)(a). The Affidavit of Special Agent Ault submitted on November 28, 1972, clearly reflects the Government's knowledge of phone calls from the phones of identified suspects in the gambling business including numbers 216-777-0850 and 0851 to phones subscribed to or utilized by Robbins, and Robbins' activity in gambling. Furthermore, the additional Affidavit submitted on December 26, 1972, reflects that Robbins was intercepted as a result of the first Order authorizing electronic surveillance. Therefore, the failure to include Robbins in the Applications and Orders of December 26, 1972, as a person known to the Government whose communications are to be intercepted, directly contravenes the mandate of 18 U.S.C. §§ 2518(1)(b)(iv) and 2518(4)(a) and necessitates the suppression of the contents of intercept-

ed communications resulting therefrom and evidence derived therefrom as to this defendant. 18 U.S.C. § 2518(10)(a)(i), (ii). *See, United States* v. *Kahn*, 471 F. 2d 191 (7th Cir. 1972), cert. granted —— U.S. —— (1973).

Accordingly, the contents of any intercepted communications and evidence derived therefrom resulting from the Orders and Applications of December 26, 1972, as to defendant Robbins is hereby suppressed.

Upon consideration of the Oral Motion of Vanis Ray Robbins to Suppress the Search Warrants directed against him and his premises (defendant Robbins' Exhibits P, Q, and R), the Court finds an absence of evidence on the record or on the face of the documents to indicate any improprieties in the execution of the Search Warrants. Accordingly, the Motion is overruled. Fed. R. Crim. P. 41(d).

With regard to the Motion to defendants Louis Glassman and Sanford Glassman to Suppress, said Motion is vague, general, and fails to raise specific issues of fact or law. In view of the Court's comprehensive examination of issues relating to the electronic surveillance and physical searches conducted in this matter as to all defendants, including the Glassmans, the Motion is without merit and is overruled.

Regarding the identical Motions to Suppress of defendants Joseph Francis Merlo and Jacob Joseph Lauer, the Court has heretofore determined that the Applications and Orders dated November 28, 1972, complied with all provisions of the Statute

including 18 U.S.C. § 2516(1), and thus the first allegation in the Motion is overruled. Upon consideration of the second allegation, that the Application and Order of December 26, 1972, failed to name these defendants in violation of 18 U.S.C. § 2518(4)(a), the Court finds insufficient evidence on the record indicating that the Government anticipated interception of their communications, thus this allegation is overruled.

Defendants Merlo and Lauer further charge that they have not been served with notices of inventory with regard to the Applications and Orders of November 28, 1972, and December 26, 1972, pursuant to 18 U.S.C. § 2518(8)(d). Upon consideration of the record, including the comprehensive Orders for inventory contained in Defendants' Exhibits J and L pursuant to which 39 persons were served notices of inventory, and the Government's admission that defendants Merlo and Lauer were not served with inventories pursuant to the Act or otherwise notified that they had been intercepted, the Court finds that in the interests of justice their communications must be suppressed. 18 U.S.C. § 2518(10)(a)(i), (ii); *United States* v. *Whitaker*, 474 F. 2d 1246 (3rd Cir. 1973), *cert. denied*, 93 S. Ct. 3003 (1973); *United States* v. *Eastman*, 465 F. 2d 1057 (3r Cir. 1972).

Accordingly, the contents of all intercepted communications and evidence derived therefrom as to defendants Lauer and Merlo is hereby suppressed.

Upon consideration of the Motion to Suppress of Dominic Ralph Buzzacco, the Court finds:

1. Allegation No. 1 is overruled for the reasons heretofore outlined on p. 18, ¶ 3;

2. Regarding Allegation No. 2 challenging the search of the premises known as 15½ East Park Street, Niles, Ohio:

   a. The Court has found no impropriety in the electronic surveillance under 18 U.S.C. § 2516 (1);

   b. There is sufficient evidence of probable cause to support the warrant. Fed. R. Crim. P. 41;

See, Spinelli, supra; Aguilar, supra; Coury, supra. Accordingly, the Motion is overruled.

Dominic Ralph Buzzacco has orally moved to suppress the contents of wire communications for failure of the Application and Order of December 26, 1972, to include his name in compliance with 18 U.S.C. §§ 2518(1)(b)(iv) and 2518(4)(a). Upon consideration of the Motion, the Court finds that Special Agent Ault, through a check of Ohio Bell Telephone Company records and execution of physical surveilliances, became aware of defendant Buzzacco's identity and address in Niles, Ohio, subsequent to the first set of authorized wire interceptions. Agent Ault further testified that he was aware of Buzzacco's activity and believed he was involved in gambling activities prior to submission of the Affidavit on

December 26, 1972. Therefore, the Motion is granted and the contents of intercepted communications and evidence derived therefrom resulting from the December 26, 1972, Applications and Orders which failed to include Buzzacco are hereby suppressed as to him. 18 U.S.C. § 2518(10)(a)(i), (ii).

Regarding the Motion of James Blank to Suppress Search Warrant for premises at 5303 Northfield Road, Apt. 202, Bedford Heights, Ohio, the Court finds sufficient evidence of probable cause in the Affidavit to support issuance of the Warrant and the Motion is therefore overruled. Fed. R. Crim. P. 41; *See, Spinelli, supra; Aguilar, supra; Coury, supra.*

Upon further consideration of the Joint Supplemental Motions of Harvey Trifler, Ernest Chickeno, George Frank Sidoris, Joseph Slyman, James Neil Girard, Thomas W. Donovan and Albert Kotoch to Suppress and Controvert Search Warrant, the Court finds:

1. Allegation No. 1 is overruled, the Court having previously determined that the Application and Order dated November 28, 1972, complied with 18 U.S.C. § 2516(1);
2. With regard to Allegation No. 2 charging that the Application and Order of December 26, 1972, failed to contain the identity of the persons committing the offense whose communications were to be intercepted, the Court finds that said Application and Order included the

identifies of all such persons known to the Government with the exception of defendant Donovan. The record clearly reflects, and the Government concedes, that Donovan was intercepted during electronic surveillance conducted pursuant to the Order of November 28, 1972, and that as a result the Government became aware of his name and address. Therefore, the failure to include Donovan in the Applications and Orders of December 26, 1972, directly contravenes the mandate of 18 U.S.C. §§ 2518(1)(b)(iv) and 2518(4)(a) and necessitates the suppression of the contents of intercepted communications resulting therefrom and evidence derived therefrom as to this defendant. 18 U.S.C. § 2518(10)(a)(i), (ii).

Accordingly, the contents of intercepted communications resulting from the Applications and Orders of December 26, 1972, and evidence derived therefrom as to Donovan is hereby suppressed. The Joint Supplemental Motions of all other defendants are overruled.

Regarding the oral, Joint Motions of Jack Lorenzetti and Michael Malvasi to Suppress evidence from Search Warrants directed against them, the Court finds sufficient evidence of probable cause in the Affidavits to support issuance of the Warrants and the Motions are therefore overruled. Fed. R. Crim. P. 41; *See, Spinelli, supra; Aguilar, supra; Coury, supra.*

The oral Motion of Harvey Trifler to Suppress on the ground his name was not included in the original inventory Ordered by Judge Battisti on February 21, 1973, is without merit and overruled, in view of the Amended Order Directing Service of Inventory on him, signed by Judge Battisti on September 11, 1973. *See, United States* v. *Cafero,* 473 F. 2d 489 (3rd Cir. 1973), U.S. App. pndg.; *United States* v. *Curreri,* 363 F. Supp. 430 (D. Md. 1973); *United States* v. *LaGorga,* 336 F. Supp. 190 (W.D. Pa. 1971); *United States* v. *Lawson,* 334 F. Supp. 612 (E.D. Pa. 1971).

IT IS SO ORDERED.

/s/ Robert B. Krupansky
United States District Judge

APPENDIX E

18 U.S.C. 2510 *Definitions*

* * * * *

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

18 U.S.C. 2517 *Authorization for disclosure and use of intercepted wire or oral communications*

* * * * *

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of the communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

* * * * *

18 U.S.C. 2518 *Procedure for interception of wire or oral communications*

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such

application. Each application shall include the following information:

* * * * *

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

* * * * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall au-

tomatically terminate when the described communication has been first obtained.

* * * * *

(8) * * *

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518 (7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of com-

petent jurisdiction the serving of the inventory required by this subsection may be postponed.

* * * * *

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval. * * *

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